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Review of International Product Liability

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INTERNATIONAL PRODUCT LIABILITY: A STUDY OF COMPARATIVE AND INTERNATIONAL LEGAL ASPECTS OF PRODUCT LIABILITY, by H.D. Tebbens, T.M.C. Asser Institute: Sijthoff & Noordhoff, 1979. Pp. 433. $37.50 — A comprehensive analysis of product liability from an international perspective, and particularly a work of the quality of Professor Tebbens', is a valuable addition to the rapidly expanding collection of works available to those interested in this area of law. It enables academics to assess the fairness, effectiveness and rationale of local product liability laws on a comparative basis, by outlining legal developments in several western

societies in response to similar social, economic and political arguments favouring product safety and quality regulation. It allows practitioners, regardless of the interests of their clients, to obtain a general yet surprisingly accurate assessment of the central issues presented by a potential product liability suit in a foreign jurisdiction. And it offers members of the judiciary a concise survey of legal developments in a number of jurisdictions upon which they may draw as a foundation for judicial creativity and imagination. One hopes that this knowledge might eliminate an all too common judicial fear of experimentation or innovation, for Professor Tebbens offers the reader a broad perspective on the impact of actual legal developments which have been introduced without apparent harm in not dissimilar social and political arenas.

The book proves to be a nice complement to Professor Waddams' Canadian work on products liability[1] which examines many similar issues from what is in essence a North American perspective. Professor Tebbens' work recognizes that academics, practitioners and the judiciary are even now obliged to assess product liability claims from an international perspective in light of the massive international trade in consumer goods, the development of "world product" mandates by multi-national corporations, and the recent promulgation of an international agreement designed to reduce technological barriers to international trade in consumer goods.

The approach taken by Professor Tebbens is apt to meet all of these needs. The book is divided into two relatively distinct parts. The first, consisting of Chapters 1 and 2, examines the substantive law and policy surrounding product liability from an international perspective. The second, consisting of Chapter 3, focuses on conflict of law problems. This reviewer will examine the former part of the text; the latter will be reviewed in a forthcoming issue of this journal.

Professor Tebbens begins with a short introduction to product liability in which he introduces the major thesis of his book — the *concept* of product liability — which has been created in response to deep human suffering, and real economic, political and social forces, and apart from formal, doctrinal rationalizations based on consensual or non-consensual liability. It is at this stage that we are introduced to the basic distinction between production defects and design defects, a distinction which is familiar to

[1] S.M. Waddams, *Products Liability* (2nd ed., 1980).

many but which has been noticeably absent in most Canadian studies in this field.[2]

The second chapter of the book examines the substantive product liability laws of the United States, England, Canada, the Federal Republic of Germany, France and the Netherlands. The choice of Canada is somewhat unusual since our substantive law offers few, if any, interesting perspectives on product liability. The stated Canadian law of product liability is essentially identical to that of Britain, and recent major statutory reforms in several provinces,[3] and significant judicial developments[4] clearly occurred too late for inclusion in the text. The review of American law will be familiar to most North American readers, and in any event, is easily accessible to any English speaking reader. It is, however, a necessary aspect of any international review of product liability if only for the depth and sophistication of the analysis which the Americans have brought to this area of law.

This section of the book represents the clearest statement of the two conceptual approaches to product liability: contractual, which looks to consumer expectation and explicit assumption of risk; and legal, which involves a judicial assessment of the permissible dangerousness of a product in light of innumerable factors, including user expectations and expertise, information transfer and access, technological feasibility of improvements, social utility of the product, and the nature, frequency and severity of the harm occasioned through use of the product.

The review of American law is followed by a similar review of English law which serves as an introduction to the section on Canadian law. There are, however, a number of errors in this section of the text, including a description of the Misrepresentation Act as conferring "a right of action for damages upon the person who has been induced to enter into a sales contract by an innocent but negligent misrepresentation".[5] The value of Tebbens'

[2] *Id.*, at 42-43, 50-51, 217. The Ontario Law Reform Commission barely mentions the distinction in its *Report on Products Liability* (1979) at 14.

[3] New Brunswick Consumer Product Warranty and Liability Act, 1978, S.N.B. 1978, c.C-18.1; Consumer Products Warranties Act, 1977, S.S. 1976-77, c.15.

[4] See *Murray v. Sperry Rand* (1979) 5 B.L.R. 284 (ONT. H.C.); *Naken et al. v. General Motors of Canada et al.* (1978) 21 O.R. (2d) 780 (C.A.); *Langille v. Scotian Gold Co-op and Thomas Equipment Ltd.* (1978) 33 N.S.R. 157 (N.S.S.C., TRIAL DIV.); *General Motors Products of Canada Ltd. v. Kravitz* (1979) 93 D.L.R. (3d) 481 (S.C.C.).

[5] See Misrepresentation Act (U.K.) 1967, c.7, s.2(2).

discussion of Canadian law to Canadian readers lies in his analysis of the civil law of Quebec, which when read in conjunction with the section on French law, offers a convincing explanation for the Supreme Court of Canada's conceptual approach to product liability in the common law, and the historical development of the *Kravitz*[6] doctrine in the French courts.[7]

The German and Netherlands sections become somewhat repetitive from a North American perspective in that few new policy foundations or conceptual explanations for product liability are offered. Any comparative approach which looks only to Western democratic societies will necessarily suffer from this failing but the sections remain interesting for the information they contain.

The remaining sections of Chapter 2 are devoted to a comparative evaluation of products liability, the role of product liability insurance, statutory standards, and European harmonization of product liability.

It is somewhat disappointing that Professor Tebbens devotes so little space to the comparative and policy foundations for product liability. It is here that one uncovers the reasons for, rather than the rationalization of, the concept of product liability, and it is here that a review and assessment of social, political and economic foundations for product liability drawn from a number of national perspectives might have generated reforms and analysis not apparent when one looks only at local concerns. Nonetheless, this section of the book offers several interesting points for consideration. An issue which deserves further exploration is the influence of social health and security schemes on products liability, a matter which certainly plays a role whenever one considers national health care, pension, unemployment and income supplement programmes which may reduce the catastrophic losses concomitant to product liability. An attempt to articulate from an international perspective the very powerful notions of social morality which reinforce economic efficiency "in the sense of eliminating unnecessary accident costs"[8] would have

[6] *Supra*, note 4.

[7] H.D. Tebbens, INTERNATIONAL PRODUCT LIABILITY: A STUDY OF COMPARATIVE AND INTERNATIONAL LEGAL ASPECTS OF PRODUCT LIABILITY (1979) at 59, 87.

[8] J.A. Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best* (1980) 128 U. PENN. L. REV. 1036, at 1041.

offered a unique addition to the literature on this subject. Nonetheless, Professor Tebbens' conceptual analysis of defect, and his apparent support for a non-contractual, and therefore more realistic approach to product liability, suggests that he does not consider a purely doctrinal approach to be particularly useful in coming to solutions to the very complex problems presented in this area of the law.

This study suffers from several additional shortcomings. First, it fails to pursue in any detail the issue of remedies. This is somewhat disconcerting in view of Tebbens' acknowledgment of the compensatory and incentive motivations behind the development of strict product liability, and in light of the recent theoretical writings describing the role of injunctive relief in private law.[9] Second, the scope of the book is limited to *product* liability, thus omitting almost entirely the very significant issue of the liability of suppliers of services to consumers.[10] Admittedly, the likelihood of international claims in respect of the supply of services is somewhat less than that of products, but claims may occur, and certainly municipal law relating to the supply of services will influence the development of product liability generally. Third, the countries studied by Professor Tebbens' exclude non-western nations. In light of the level of trade among Japan, North America and the E.E.C. countries, and in view of the potential growth in trade with European communist nations, a truly international perspective would have been of practical relevance as well as of intellectual interest. Fourth, specific issues relating to product liability which may be of particular relevance when assessing product liability from an international perspective are not discussed. These include the responsibility of foreign corporations for product liability claims of wholly-owned or controlled subsidiaries, and the responsibility of successor enterprises for product liability claims in the case of takeovers, mergers and amalgamations. Fifth, Tebbens fails to devote even a small portion of his work to a comparative analysis of class actions and contingent fee arrangements which have radically altered the face of product liability in the United States during

[9] G. Calabresi, & A.D. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* (1972) 85 HARV. L. REV. 1089; A.T. Kronman, *Specific Performance* (1978) 45 U. CHI. L. REV. 351; B.H. Thompson Jr., *Injunction Negotiations: An Economic, Moral and Legal Analysis* (1975) 27 STAN. L.REV. 1563.

[10] Tebbens does mention service liability in passing, *supra*, note 7, at 16, 51, 52, 60, 70, 89, and 126.

the past decade. Finally, we have the usual assortment of typographical errors.[11]

Notwithstanding these shortcomings, the conclusions one reaches after completing the first two chapters of the book are important. First, one is forced to acknowledge the inexorable trend toward *strict* product liability of *all* of the legal systems reviewed in the book. Second, one is left with the very rewarding impression that the world of product liability is far more familiar than one might have imagined. The development of reverse onus of proof doctrines or presumptions of negligence in Germany, France and the Netherlands,[12] and the resolution of disclaimer clauses and standard form contracts in those jurisdictions, will be familiar to all Canadian lawyers. And when one reads of the exploding lemonade bottle in the Netherlands resulting in the loss of a child's eye, or of the injuries suffered by a bystander when a steering mechanism failed in an automobile produced by Ford Nederland N.V., the similarity in legal response is not at all surprising.

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[11] *Id.*, at 38, 123, 125.

[12] *Id.*, at 69, 91, 105.

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